SUPREME COURT, U. S.

MAY 29 1969

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In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 1354.

CHARLES F. KRAUSE, ADMINISTRATOR, D.B.N., C.T.A. OF THE ESTATE OF LARRY L. GOLDSTEIN, DECEASED,
Petitioner,
v.
LUCIEN ANDRE CHARTIER, NORTH CENTRAL AIRWAYS, INC., AND ELVIRA PETTERUTTI, ADMINISTRATRIX OF THE ESTATE OF PASCO A. PETTERUTTI,
Respondents.

BRIEF OF ELVIRA PETTERUTTI, ADMINISTRATRIX OF THE ESTATE OF PASCO A. PETTERUTTI, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States.

October Term, 1968.

No. 1354.

CHARLES F. KRAUSE, Administrator, d.b.n., c.t.a. of the Estate of Larry L. Goldstein, Deceased,
Petitioner,
v.
LUCIEN ANDRE CHARTIER, NORTH CENTRAL AIRWAYS, INC., and ELVIRA PETTERUTTI, Administratrix of the Estate of Pasco A. Petterutti,
Respondents.

BRIEF OF ELVIRA PETTERUTTI, ADMINISTRATRIX OF THE ESTATE OF PASCO A. PETTERUTTI, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Elvira Petterutti, administratrix of the estate of Pasco A. Petterutti, opposes issuance of the writ of certiorari for which petitioner has prayed and, pursuant to Rule 24, respectfully submits this, her brief in opposition.

Statement of the Case.

This respondent agrees generally with that portion of petitioner's "Statement of the Case" devoted to facts, but

nevertheless feels impelled to correct certain impressions made therein and to bring to the Court's attention certain facts not set out therein. This respondent disagrees with that portion of petitioner's "Statement of the Case" which is devoted to the opinion of the Court of Appeals.

In the factual portion of his "Statement of the Case" petitioner consistently refers to the maneuvers being performed by the aircraft at the time of the accident as an "attempted landing" or as an "attempt to land." In point of fact, the aircraft crashed approximately three miles before the point at which the decision whether or not to land would be made (71a) (593a-594a).[1]

If there is a term of aeronautical art to be applied to the maneuver then being undertaken it is an "approach" as distinguished from a "landing" (59a, 64a).

At pages 9 and 10 of his petition, petitioner suggests that the initiative for the clearance to make an approach came from Chartier. Actually it *originated* with the Quonset Radar Air Traffic Control Center (Quonset RATCC) which provides approach control service for Green Airport (203a).

Finally it was demonstrated (and uncontradicted) that Chartier was at the time of trial suffering from a post traumatic amnesia which blocked his recollection of events following the Bridgeport takeoff and arrival near the Norwich omni-station (3A-4A).

In that portion of his "Statement of the Case" devoted to the opinion below petitioner contends that, in ruling

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[1] For purposes of distinction, references to page numbers of the Record Appendix of the petitioner, which is contained in volumes 1 and 2 of the documents forwarded to this Court by the Clerk of the Court of Appeals for the First Circuit are followed by "a." References to page numbers in the Record Appendix of this respondent, which is contained in volume 3 of the documents forwarded to this Court by the Clerk of the Court of Appeals of the First Circuit are followed by "A."

on the propriety of the District Court's charge on assumption of risk, the majority of the Court of Appeals ignored *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 and, instead, applied *Swift* v. *Tyson,* 16 Pet. 1. This contention overlooks that part of the majority opinion below which notes the existence of the doctrine of assumption of risk in Rhode Island (see 406 F. 2d at 899) and distinguishes, on the facts of the case, the Rhode Island decision of *Schiano* v. *McCarthy Freight System, Inc.,* 75 R.I. 253, 65 A. 2d 462 (1949). (See 406 F. 2d at 901.) Further, petitioner's contention overlooks that part of the *per curiam* opinion of the majority of the Court of Appeals on petition for rehearing in which that majority remarked, at 406 F. 2d 902:

> "Plaintiff's petition for rehearing on the question of assumption of the risk asserts that the majority of the court, hereafter court, has elected to disregard the tenets of Erie Ry. v. Tompkins, 304 U.S. 64, 58 S.Ct. 818, 82 L.Ed. 1188. The court does not in any way deny the applicability of state law; it merely, because of the existence of special circumstances, does not regard the reported state decisions as dictating a result in plaintiff's favor. . . ."

Argument.

I. DESPITE THE MANDATE OF RULE 19, PETITIONER HAS FAILED TO SHOW ANY "SPECIAL AND IMPORTANT REASONS" WHY CERTIORARI SHOULD BE GRANTED.

A. No Constitutional or Federal Statutory Provision is Involved with Respect to the Question of Assumption of Risk.

The question below, with respect to the doctrine of assumption of risk, was simply: Was it error for the District

Court to charge the jury upon assumption of risk? The majority of the Court of Appeals, in their opinion, decided that it was not. From this adverse ruling, petitioner fashions a contention that his rights under the Tenth Amendment to the Constitution of the United States and under 28 U.S.C. § 1652, have been violated.

The question before the Court of Appeals involved the interrelationship of the evidence and Rhode Island decisions dealing with the defense of assumption of risk. The majority of the Court of Appeals, at 406 F. 2d 898-899, carefully summarized the evidence, noting that petitioner's decedent had been a flying student of the respondent Chartier, observing that petitioner's decedent had been told in advance of the weather conditions, and remarking that "the jury would have been warranted in inferring that he was not ignorant of any circumstances known to Chartier" (406 F. 2d at 899). The majority cited Rhode Island cases holding that assumption of risk is a defense (406 F. 2d at 899). And, as has been noted above, the majority distinguished on a factual basis *Schiano* v. *McCarthy Freight System, Inc., supra,* upon which at pages 12, 13, 16 and 23 of his petition, petitioner relies. Finally, as has also been noted, the majority in its decision on petition for rehearing specifically stated that it was not denying the applicability of state law and that, because of the existence of special conditions, it did not regard the Rhode Island decisions as dictating a result in petitioner's favor (406 F. 2d at 902).

Thus Rhode Island law *was* applied to the facts of the case. The unembroidered fact here is that petitioner, not satisfied with the view taken by the majority below as to the effect of Rhode Island decisions, is seeking another

hearing. Yet, in *Magnum Import Company, Inc.* v. *Coty*, 262 U.S. 159, Mr. Chief Justice Taft said, at page 163:

> ". . . The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

In *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, Mr. Justice Frankfurter observed that this Court does not "sit for the benefit of the particular litigants" (349 U.S. at 74).

The question below, with respect to assumption of risk, has no relationship to the United States Constitution, to *Erie*, or to 28 U.S.C. § 1652. The majority of the Court below applied Rhode Island decisions to the evidence. The public interest would hardly be served by further review of what is essentially a dispute over interpretation of evidence in the light of state law.

B. Petitioner has Neither Claimed nor Demonstrated any Actual Prejudice in the Method of Jury Selection.

Petitioner apparently concedes that he is unable to show that his rights were prejudiced by the method of jury selection in the District Court. (See petition for writ of certiorari, p. 34.) He relies instead upon *Ballard* v. *United States*, 329 U.S. 187. He presents on that page a quotation which he claims appears at 329 U.S. 195. This respondent

is unable to find at that page, or on any other page of the opinion, the alleged quotation to which petitioner makes reference. Furthermore, this respondent cannot agree that *Ballard* stands for the proposition that is set forth in the alleged quotation. *Ballard* was concerned with the exclusion from grand and petit jury service of a large recognizable class of people: women. The jury of grand and petit jurors obviously, therefore, was not truly representative. Similarly, *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, which petitioner also cites, was concerned with exclusion from petit jury service of a large recognizable class: daily wage earners. Thus the method of jury selection in *Thiel* did not assure trial by a truly representative cross-section of persons. In both cases, large, broad, recognizable classes of potential jurors were excluded from service. That is not the situation here. Reduced to its essence, petitioner's position is that alphabetical arrangement of veniremen presented a possibility of prejudice. What that prejudice might have been, and what recognizable class of people might have been excluded, remain a mystery.

Petitioner also claims that excuse by the jury commissioners of certain persons from jury service violated the provisions of 28 U.S.C. § 1863, as that statute existed at the time of trial. (See testimony of the District Court clerk, 739a-752a.) Yet a careful examination of the record reveals nothing which establishes that any person was excused from the panel of which the petit jury which decided this case was a part. Petitioner's questioning of the District Court clerk in this respect initially dealt specifically with the case in question (740A-742A). The testimony with respect to excuse from jury duty (744A-745A), however, came in the midst of a series of questions relating to general practices of the jury commissioners in connection with questionnaires distributed to all jurors. If any person

was in fact excused from the panel of jurors of which the petit jury which heard this case was a part, that person was never identified. It is mere speculation to state that jurors were improperly excluded in this case. Even if they had been, to say that spouses of government employees who work in the same building, or on the same floor, as that which houses the District Court, constitute a recognizable class within the ambit of *Ballard* or *Thiel* is to misstate the law.

Petitioner has failed to show that his rights were harmed by the method of jury selection used in this case.

C. In View of the Enactment of the Jury Selection and Service Act of 1968, Petitioner's Claim of Improper Jury Selection is of No Public Importance.

Subsequent to the trial of this case Congress enacted the Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53; see also 28 U.S.C. §§ 1861-1869 and 1871, as amended. The date of enactment was March 27, 1968. The Act was to take effect no later than 270 days after enactment, but would not apply to cases in which an indictment had been returned or a particular jury empaneled prior to the effective date. Pub. L. 90-274, § 104. The Act is thus now in effect.

This new statute enacts certain measures to assure random jury selection. See, *e.g.*, 28 U.S.C. §§ 1863, 1864, 1865 and 1866, as amended. In view of the existence of this Act, petitioner's allegation of improper jury selection is of no general significance to the public. In *District of Columbia* v. *Sweeney*, 310 U.S. 631, a petition for certiorari was denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." And in *Rice* v. *Sioux City Memorial*

Park Cemetery, Inc., supra, a writ of certiorari was dismissed as improvidently granted even after the opinion of this Court had been rendered. Petitioner in that case had unsuccessfully claimed damages in the Iowa courts by reason of defendant's refusal to bury her husband, a Winnebago Indian, in a burial lot, the contract of sale of which restricted burial rights to Caucasians. This Court, being evenly divided, affirmed a ruling of the Iowa Supreme Court adverse to petitioner (348 U.S. 880). Thereafter, on petition to have the full Court rehear the case, the Court's attention was directed to an Iowa statute passed after the commencement of the litigation and in existence at the time the case came to this Court. The Iowa statute forbade racial discrimination by cemeteries, although one of its provisions made it specifically inapplicable to pending litigation. At 349 U.S. 76-77, Mr. Justice Frankfurter remarked:

> "Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance. . . ." (Footnote omitted.)

Like petitioner's claim in *Rice,* petitioner's claim here, in view of subsequent statutory enactment, has such an isolated significance that it is not a proper subject for further review.

Conclusion.

Petitioner has failed to show that there are "special and important reasons" which merit certiorari. The question of assumption of risk is simply a question of how Rhode Island law is to be applied to the evidence. The enactment of the Jury Selection and Service Act of 1968 changes the

method of jury selection in the District Courts so that petitioner's claims with respect to jury selection are of no public significance. Moreover, petitioner has failed to show that the method of jury selection prejudiced him. This case is simply a dispute between private litigants. Further review of it would be of no benefit to the general population.

Prayer.

This respondent prays that the petition for certiorari be denied.

Respectfully submitted,

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